March 1, 2017

Supreme Court of Canada Protects Freedom of Expression of Individuals During Election Campaigns

By: Linda McKay-Panos

Case Commented On: *BC Freedom of Information and Privacy Association v British Columbia (Attorney General)* 2017 SCC 6 (CanLII)

In this case, which involves political speech that is at the very core of protected expression in Canada, the Supreme Court of Canada's (SCC) ruling doesn't turn on lofty values as much as it relies on statutory interpretation. It also provides some interesting discussion on the amount of evidence the government must provide in order to defend a violation of *Charter* section 2(b) under *Charter* section 1 in the election context.

The British Columbia Freedom of Information and Privacy Association (Association) challenged British Columbia's *Election Act*, RSBC 1996, c 106, section 239, which requires registration with the Chief Electoral Officer by individuals or organizations who wish to "sponsor election advertising." The SCC had previously upheld similar election registration legislation applying to third parties who spent at least $500 on election advertising (see, for example *Harper v Canada (Attorney General*), 2004 SCC 33, [2004] 1 SCR 827 (CanLII)(*Harper*)).

The Association applied for a declaration that, to the extent that *Election Act* section 239 applied to organizations and individuals that spent under $500 in a given campaign period, this violated *Charter* section 2(b) (freedom of expression) and could not be justified under *Charter* section 1. Based on the ruling in *Harper*, the Association argued that those who fell below the $500 threshold should not be forced to register (at para 12). The Association and interveners, such as the British Columbia Civil Liberties Association, were concerned that the requirement to register might have the effect of discouraging people from speaking out about issues during election campaigns, especially if they believe their views are unpopular or contentious (See: "BCCLA Reacts to Supreme Court's Decision on BC's Election Gag Law" January 26, 2017)

The Association expressed concern that the impugned legislation would unconstitutionally limit the expression of people who want to convey political messages through small-scale election activities such as displaying homemade signs in their windows, putting bumper stickers on their cars, or wearing T-shirts with political messages on them (at para 2). The lower courts had accepted the Attorney General's concession that section 239 did infringe freedom of expression, but held that the infringement was justified under *Charter* section 1 (at para 13).

The SCC noted that neither of the lower courts had scoped out the nature of the limitation on freedom of expression that section 239 imposed (at para 19). Rather, these courts had accepted the view that the registration requirement in section 239 applied to "essentially all 'election advertising'" (at para 19). This would include an "individual who posts a handmade sign in her window" (at para 19).

Chief Justice McLachlin, delivering the judgment of the Court, applied standard statutory interpretation rules, and held that the correct interpretation of section 239 meant that it is directed only at those "sponsors" who either pay for advertising services, or those who provide advertising services without charge as a contribution. She noted that the ordinary meaning of "sponsor" does not suggest a person engaged in individual self-expression, but rather a person or group that is undertaking an organized campaign (at para 24). She relied on the definition of "sponsor" found in the *Collins Canadian Dictionary* (2010) at p 911: "a 'sponsor' is a person or group that promotes another person or group in an activity or the activity itself, either for profit or for charity" (at para 24). Thus, the registration requirement in section 239 did not apply to individuals involved in self-expression activities (at para 21). This ruling did not exempt the Association from the registration requirement, even if it paid less than $500 for the advertising services. Thus, while the SCC addressed the concern raised about individuals making political statements, it did not address smaller scale efforts by small organizations when there was money paid for advertising services or these services were donated.

This aspect of the ruling is somewhat unclear. The intention of the legislation appears to focus on the nature of the activity rather than the amount paid for the "sponsorship". However, the BC Chief Electoral Officer interpreted section 239 as stating that "[e]lection advertising rules do not distinguish between those sponsors conducting full media campaigns and individuals who post handwritten signs in their apartment windows" (at para 19). The exclusion by the SCC of personal expression neglects the situation when a personal view can certainly be very supportive of and have a significant effect on a candidate's success (e.g. a T-shirt with a message worn by a famous person which is widely seen on television or social media). Would this not be a significant contribution to an election campaign? Yet, based on the SCC's interpretation, it would not fall under section 239 at all. However, the purpose of section 239 as set out under the SCC's *Charter* section 1 analysis (increasing transparency, openness and accountability) would seem to be challenged by this possibility.

A second interesting feature of the Supreme Court ruling was its discussion on *Charter* section 1. The SCC upheld the limit on expression of sponsors who spend less than $500 as justified. The purpose of the registration requirement was seen to be pressing and substantial: increasing transparency, openness, and public accountability in the election process, and thereby promoting an informed electorate (at para 51). In addition, the registration requirement was seen as rationally connected to this objective (at para 52; citing *Harper* at para 143). The limit was also found to be minimally impairing, because it confined the registration requirement to sponsors, as it exempted individual political self-expression by persons who are not sponsors (at paras 54-55). Any deleterious effects were outweighed by the benefits of allowing the public to know who is engaged in public advocacy in their elections, ensuring those who sponsor election advertising provide evidence that they are in compliance with elections law, and providing the Chief Electoral Officer with information that can assist in the enforcement of the Act (at para 55).

Although the cases involving limitations on core speech often require the government to provide social science evidence to support its arguments on justification, in this particular case, providing such evidence was not necessary, as the SCC concluded that the scope of the infringement was minimal. The Court noted that *Harper*, *R v Bryan*, 2007 SCC 12 (CanLII), and *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877 (CanLII) addressed the evidentiary standard required at the justification stage in the election context (at para 58). Although these earlier cases discussed evidence of harm required in some detail, in this case because the infringement was minimal, supporting social science evidence was not necessary (at para 58).

The outcome of the case would not have been any different if the lower courts' conclusion had been accepted that *Charter* section 2(b) was violated by *Election Act* section 239, including for self-expression, but the violation was justified under section 1. However, this interpretation would have required a perhaps more logical assessment of the impact of modern communication methods, such as social media, on transparency, accountability and openness.

This post may be cited as: Linda McKay-Panos "Supreme Court of Canada Protects Freedom of Expression of Individuals During Election Campaigns" (1 March, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/03/Blog_LMP_BCFOIPA.pdf